

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
Streamlining of Radio Technical)
Rules in Parts 73 and 74 of the)
Commission's Rules)

MM Docket

To: The Commission

PETITION FOR STAY

Nelson Enterprises ("Nelson"), by its attorney, respectfully petitions for an immediate limited stay of the effectiveness of certain provisions of the First Report and Order, 1998 Biennial Regulatory Review--Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, FCC 99-55, released March 30, 1999 ("First R&O"). The provisions of interest concern the reclassification, from "major change" to "minor change", of an application to change the frequency of an existing AM station to an adjacent channel and/or to increase power. Such reclassification should not go into effect until the freeze on new and major change applications has been lifted. In support thereof, the following is shown.

The First R&O revised the definition of AM minor change applications to include a change of a station's frequency to a first, second or third adjacent channel, and increase in transmitter power. The effect of this action is to lift the present freeze on such applications. However, the filing of AM applications which remain classified as major change, i.e. new and non-adjacent channel changes, remains prohibited pending the opening

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of a filing window. The Commission has frozen such applications for about three years, and has yet to announce a filing window.

Nelson, together with related entities, is the operator of a number of broadcast stations, both AM and FM. It is actively seeking to improve its existing facilities, and to acquire new ones. In particular, Nelson has identified one or more new AM opportunities, but has been unable to file with the Commission because of the present "freeze" on new and major change applications. Nelson's desires would be classified as a "major change" even under the revised rules. It must, therefore, wait until the opening of a filing window for major changes before it may submit its proposal to the Commission.

However, Nelson has determined that existing AM station(s) could interfere with Nelson's desired action by moving to an adjacent frequency and/of increasing power, which under the revised rules, would be a "minor change".¹ Applications which conflict with Nelson's intentions could be filed on the effective date of the new rules and would receive immediate cut-off protection, with the effect of precluding Nelson from submitting his proposal(s). This situation is unfair to Nelson and similarly-situated potential applicants, as well as potentially dis-serving the public interest.

In its NPRM on this matter, 1998 Biennial Regulatory Review-Streamlining of Radio Technical Rules in Parts 73 and 74 of the

¹ For obvious reasons, Nelson does not wish to disclose the particulars of its proposal(s), but will supply them to the Commission under seal, upon request.

Commission's rules, 13 FCC Rcd 14849 (1998), the Commission recognized that the proposed changes might restrict the ability of certain applicants to apply for desired modifications of their facilities, stating

We do not believe, however, that other prospective applicants would be unfairly prejudiced by this policy because prospective applicants have the ability to predict whether other area stations have the potential to seek facilities increases based on applicable contour protection requirements and to file first for enhanced facilities.² Thus, the process would be designed to favor the party that is most prompt in submitting its request to the Commission.

However, the present freeze on major change applications does not permit prospective applicants to file "first". It is, therefore, necessary for the Commission to give all potential applicants one opportunity to file their proposals, thus placing those who desire to file a major change application on an equal footing with those who would file an application newly classified as a minor change. The Commission is required to give all potential applicants a reasonable opportunity to file. Ashbacker v. FCC, 326 US 327 (1945). Failure to allow such filings would improperly benefit one class of potential applicants at the expense of another, and possibly harm the public interest. The Commission is bound to consider similarly-situated applicants

² See 47 CFR §§73.37(a) (AM daytime contour protection requirements); 73.182(q) (AM nighttime contour protection requirements); 73.509 (NCE FM stations must protect 1 mV/m contour of NCE FM stations); 74.1204 (FM translators must protect primary service contours of existing FM and FM translator stations); see also Report and Order, 8 FCC Rcd at 4738 (employing similar reasoning in adopting cut-off protection for minor change applications against rulemaking petitions)

similarly, and cannot arbitrarily benefit one applicant while denying the same benefit to another. cf. Green Country Mobile-phone, Inc. v. FCC, 765 F. 2d 235 (D.C. Cir 1985).

The Commission analogized its reclassification of AM applications to the existing situation in FM, where applications for adjacent channels and power increases may be filed as minor change applications. However, there is one significant difference. FM stations are governed by the Table of Allotments, Section 73.202(b) of the rules. A potential applicant for a new station, or for a non-adjacent change in frequency, is presently able to file a petition for rule making to allot his desired frequency. A minor change application filed subsequent to the petition for rule making is treated as a counterproposal, whose merits will be compared to those of petitioner's proposal. AM, which does not have a table of allotments, acts only via applications. As long as new and major change AM applications are frozen, the similarity with FM procedures does not obtain.

Given the above, Nelson requests a stay of the effective date on which an AM station's frequency shift to a first, second or third adjacent channel, and/or power increase, becomes a minor change application. Such stay should remain in effect only until the close of the first AM new and major change filing window, as this would allow Nelson and similarly-situated applicants the same opportunity to present their proposals to the Commission as is given to existing AM stations who wish to change to an adjacent frequency and/or increase power. This latter group could

file their proposals as major changes during the initial filing window, and thus not be precluded by other, mutually exclusive, new and major change applications.

The public interest is best served by having the greatest number of proposals presented to the Commission, consistent with expeditious action on pending applications.³ Allowing the filing of a new group of minor change applications while continuing to foreclose the filing of new and major change ones will not necessarily lead to optimum proposals of spectrum utilization, and may very likely result in the public being deprived of benefits which would otherwise obtain.

There will be little, if any, harm to the public interest from granting Nelson's stay request. The stay will be of short duration, lasting only until proponents of AM new major change applications have an opportunity to file their applications. After the initial filing window for new and major change AM applications has closed, the Commission may then expand its definition of AM minor change applications to include second and third adjacent channel moves and power increases, for there will have been an opportunity for those interested to file potentially conflicting major change applications. Such action is the only reasonable way of ensuring fairness in the Commission's application processing procedures, as the Commission itself recognized in the above-quoted language from the NPRM.

³ Even with the advent of auctions in lieu of comparative evaluations, the Commission considers Section 307(b) ramifications of competing AM applications.

Nelson is simultaneously filing a petition for partial reconsideration of the First Report and Order, addressing this point. Therein, he demonstrates that classification of adjacent AM channel moves and/or power increases as minor changes is improper prior to allowing possibly conflicting major change applications. Nelson's petition for reconsideration is incorporated herein by reference.

Pursuant to Virginia Petroleum Jobbers Ass'n. v Federal Power Commission, 259 F. 2d 921, 925 (DC Cir. 1958), and Station KDEW(AM) DeWitt, Arkansas, 11 FCC Rcd 13683 (1996), the following elements must be shown to justify stay of the effectiveness of an agency action:

1. The likelihood that the moving party will prevail on the merits.

Nelson has demonstrated that permitting the filing of a minor change AM application, but not a major change one, is unfair, arbitrary, and injurious to the public interest. It is therefore likely to prevail on the merits.

2. The likelihood that the moving party will be irreparably harmed absent a stay.

Nelson may be foreclosed from ever presenting its proposal for new and/or improved facilities to the Commission if its instant request is denied. This is clearly irreparable harm.

3. The prospect that others will be harmed if the court grants the stay.

Grant of the stay will harm no one; in fact it will prevent

harm to innocent parties. Staying the effective date of the reclassification from major change to minor change may allow the Commission to consider applications which better serve the public interest. Those applicants who desire to take advantage of the reclassification will be able to do so when the Commission opens a major change filing window. They have not been able to file such applications since the implementation of the freeze; they will suffer no harm by waiting an additional short time.

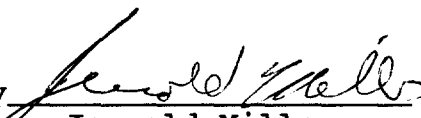
4. The public interest in granting the stay.

This factor also argues in favor of grant of a stay. As noted in the preceding paragraph, there may be an overall benefit, and not harm, from a stay, as it improves the potential for more beneficial applications.

In view of the above, the Commission should stay the effectiveness of the reclassification of AM adjacent channel changes and power increases until it allows the filing of new and major change applications.

Respectfully submitted,

NELSON ENTERPRISES

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